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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 387

ARMCO STEEL CORPORATION,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE and CLARENCE W. LOCK, Commissioner, (substituted for Louis M. Nims),

Appellees.

On Appeal from the Supreme Court of Michigan

MOTION TO DISMISS OR TO AFFIRM

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH. — 1960

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Appellees.

On Appeal from the Supreme Court of Michigan

MOTION TO DISMISS OR TO AFFIRM[1]

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees move that appellant's appeal from the judgment entered in accordance with the opinion of the Supreme Court of Michigan of April 11, 1960 (JS16a-38a) be dismissed on the following grounds:

1. It does not present a substantial federal question;

[1] Unless otherwise indicated, numbers in parentheses preceded by "JS" will refer to pages of the appellant's Jurisdictional Statement, and numbers preceded by "App" will refer to pages in the printed appendix in the Supreme Court of Michigan.

2. Appellant's case does not present a federal question; and

3. The judgment of the Supreme Court of Michigan is conclusive.

In the alternative, appellees move that said judgment be affirmed on the ground that it is manifest the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

OPINIONS BELOW

The opinions of the courts below, and references thereto, are correctly set forth by appellant (JS 1a-38a).[2]

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein, the appeal should be dismissed.

ANALYSIS OF STATUTES INVOLVED

For the purpose of this appeal appellant has correctly stated the Michigan statutes involved, being Act No. 150 of the Michigan Public Acts of 1953, as amended by Act No. 282 of the Michigan Public Acts of 1955. (Michigan Compiled Laws 1948, Vol. 5A, Part I, page 573, § 205.551

[2] Opinion of Wayne County Circuit Court Judge George C. Bowles (JS 1a-15a) and opinion of the Michigan Supreme Court reported in 359 Mich 430, 102 NW (2d) 552, (JS 16a-38a).

et seq.; Henderson Michigan Stat. Ann. Cum. Sup. § 7.557(1) et seq.)[3]

The Supreme Court of Michigan determined the operative effect of the statute as follows:

> "• • • The title announces it to be 'An act to provide for the raising of additional public revenue by prescribing certain *specific taxes on income* • • •.' The act provides that the terms 'income' and 'adjusted receipts' are used therein interchangeably and that they shall be the gross receipts from business, including sales, less specified deductions, consisting of certain costs of conducting business, or, if such deductions do not constitute at least 50% of the gross receipts, then less a 50% deduction. The definition

[3]

Prior to amendment by Act No. 282 of the Michigan Public Acts of 1955, for the period January 1, 1954 to July 1, 1955 the statute contained a sales factor apportionment formula which required the adjusted receipts or income of appellant attributable to Michigan to be determined by the ratio of Michigan receipts to total receipts.

Appellees agreed that appellant could use the Massachusetts-type formula (consisting of property, payroll and sales), as placed in the statute by Act No. 282 of the Michigan Public Acts of 1955, for the entire tax period here involved, e.g., the calendar years 1954 and 1955. In accordance with such permission, the appellant recomputed its tax for the year 1954 to be in the amount of $25,084.69, instead of $37,176.14 as obtained under the sales factor formula, and for 1955 in the amount of $47,901.96, instead of $56,544.37. Thus, the amount of tax imposed upon the appellant here in controversy is not $93,720.51, but rather $72,986.65. [The figure $95,951.71 (JS 32a) includes interest.]

An example of the computation by use of the sales factor is contained on page 3 of appellant's 1954 annual return appearing opposite page 26 of appellant's Appendix before the Michigan Supreme Court.

of 'gross receipts' includes the entire receipts from any sales, whether made in inter- or intrastate commerce. A number of exemptions from the tax are provided, including the first $10,000 of adjusted receipts, and anything which the State is expressly or impliedly prohibited from taxing by the Constitution of the United States.

"With respect to adjusted receipts or income of the business of persons engaging in any activity in Michigan a tax of 4 mills was laid on such adjusted receipts allocated to Michigan or, under later amendment [Act No. 282, Michigan Public Acts of 1955, effective July 1, 1955], 6-½ mills on adjusted receipts derived from or attributable to Michigan sources. The act, as last amended, provides that adjusted receipts derived from or attributable to Michigan sources shall be taken to be (1) the entire adjusted receipts of a taxpayer whose business transactions take place entirely within the State, but, (2) in the case of a taxpayer whose business transactions occur partially within and partially without this State, only that portion of his adjusted receipts obtained by applying thereto the following apportionment formula, viz., the average of the following 3 percentages, separately computed: (1) ratio of taxpayer's Michigan property to all of his property, (2) ratio of wages paid by taxpayer in Michigan to wages he paid everywhere, and (3) ratio of his gross receipts from Michigan sales to those obtained from sales everywhere.[4] Before the 1955 amendment a different

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[4] Michigan sales are defined as sales where deliveries or shipments are made to points within the state [Sec. 3(b) (1)C of Act No. 150, of the Michigan Public Acts of 1953, as amended (JS 42a)].

formula was applied.[5] • • •

> "This tax is part of a general scheme of State taxation of business activities in Michigan. It is a tax on Michigan activities measured, in amount, by adjusted receipts derived from or attributable to Michigan sources, which, as above noted, in the case of a taxpayer whose business transactions occur entirely within Michigan, means his entire adjusted receipts, but, if his business transactions occur partly within and partly without this State, means the sum reached by applying to his adjusted receipts the mentioned apportionment formula. It is, therefore, not a gross receipts tax. Neither is it, as hereinafter considered, a tax on the privilege of doing interstate business in Michigan." [Bracketed material added] (JS 24a-25a)

It is respectfully submitted that this construction of Act No. 150 of the Michigan Public Acts of 1953 is dictated by the specific provisions of the statute.

It is readily apparent that § 2 (the imposition section), read in conjunction with the pertinent definitions contained in § 1 (the definition section), has the effect of imposing a tax on "income" or "adjusted receipts" from any type of activity whatsoever in Michigan, so long as engaged in with the object of gain, benefit, or advantage, directly or indirectly.[6] If a person derives "adjusted receipts" or

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[5] This is the sales-factor formula referred to in footnote 3, *supra*, p 3.

[6] The imposition section of the statute, as amended by Act No. 282 of the Michigan Public Acts of 1955, effective July 1, 1955, reads:

> "There is hereby levied and imposed upon persons engaging in business in Michigan, a specific tax on income • • •:

"income" from such activity or transactions carried on only within Michigan, no apportionment is necessary and the tax is determined on the total "adjusted receipts" or "income."[7] If a person derives the "adjusted receipts" or "income" from activity or transactions carried on both within and without Michigan, the tax is determined by that portion of "adjusted receipts" or "income" attributable to Michigan sources and activity by application of a Massachusetts-type apportionment formula.[8]

The Michigan statute, then, includes in its base an apportioned part of adjusted receipts or income as defined in the statute, so long as the income or adjusted receipts flow as a result of activity, irrespective of kind or character,

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"(b) Six and one-half mills on the adjusted receipts of all taxpayers other than public utilities derived from or attributable to Michigan sources." (JS 40a)

In Section 1, subsection (e), "business" is defined as "all activities engaged in or caused to be engaged in within Michigan, whether in intrastate, interstate, or in foreign commerce, with the object of gain, benefit or advantage, * * *." (JS 39a) In turn, subsection (f) of § 1 defines "activities" to mean "sales of property, real, personal or mixed, or the performance of services, or any combination of sales of property and performances of services." (JS 39a) Subsection (i) of § 1 defines "service" or "services" to "mean and include every type of endeavor other than sales." (JS 39a) Subsection (h) of § 1 defines "sale" or "sales" to "mean and include the transfer of possession or of ownership, or both, for a consideration." (JS 39a)

[7]

Section 3, subsection (a), reads:

"In the case of adjusted receipts of a taxpayer whose business transactions take place entirely within this state, the entire adjusted receipts of such taxpayer;" [not reproduced in the Jurisdictional Statement]

[8]

Quoted at JS 41a-42a.

carried on within the state of Michigan. To read more, or to read less, than this into the statute is not warranted. Undoubtedly, the tax imposed by Act No. 150 of the Michigan Public Acts of 1953, as amended, is a tax with the broadest conceivable type of base, drawing into its orbit any income or activity that can be said to constitute a proper subject of local taxation. The law, in express terms, imposes the tax on the "income" or "adjusted receipts" of anyone, including appellant, conducting business activities within the state.

The appellant incurred the tax liability here complained of because it received approximately Ninety-one Million Dollars ($91,000,000) in 1954 and 1955 from Michigan sources, as a result of its ability to carry on substantial and varied activity within Michigan and to utilize Michigan as a market for its products.

The operative effect of the statute, as applied to appellant, is best illustrated by the following table showing the actual computation of the appellant's tax for the years involved, by application of the Massachusetts-type formula.

	1954
Total Gross Receipts	$406,696,575.08
Less Exclusions	2,307,495.81
Gross Receipts for Tax Purposes	404,389,079.27
Less Deductions	202,194,539.64
Adjusted Receipts	202,194,539.64
Allocation Percentages	3.1065[*]
Allocated Adjusted Receipts	6,281,173.37
Less Statutory Exemption	10,000.00
Taxable Balance	6,271,173.35
Tax Rate	.004
Tax	25,084.69

[*]

Average ratio which represents percentage arrived a
ment formula, as follows:

	1954	
PROPERTY FACTOR		
Michigan Property ($62,321.00) / Total Property ($300,890,139.66)	= 0.0207	
PAYROLL FACTOR		
Michigan Payroll ($109,046.55) / Total Payroll ($113,886,840.47)	= 0.0957	
SALES FACTOR		
Michigan Destination Sales ($37,429,247.45) / Total Sales ($406,696,575.08)	= 9.2032	
TOTAL RATIO	9.3196	
AVERAGE RATIO	3.1065	

	1955	
	January-June	July-December
	$303,707,453.00	$328,667,886.00
	151,853,727.00	164,333,943.00
	151,853,727.00	164,333,943.00
	2.8620[*1]	2.8620[*1]
	4,346,053.67	4,703,237.45
	5,000.00	5,000.00
	4,341,053.67	4,698,237.45
	.004	.0065
	17,364.21	30,538.54

by application of the statutory apportion-

1955

chigan Property ($63,406.00) / tal Property ($339,603,831.00	= 0.0187
chigan Payroll ($139,131.53) / tal Payroll ($154,879,869.83)	= 0.0898
chigan Destination Sales Jan - June ($29,416,162.00) July - Dec ($24,193,049.00) / tal Sales ($632,375,339.00)	= 8.4774
	8.5859
	2.8620

It is noted that the amount of tax does not vary directly with appellant's Michigan destination sales which appellant labels "interstate." [This fact alone disposes of appellant's argument that the tax is a direct tax on interstate commerce.] For the calendar year 1954, the ratio of the tax to appellant's receipts from Michigan destination sales was .000670; for the first half of 1955, .000590; and for the last half of 1955 (reduced to an equivalent rate), .000777.[9]

If the appellant's activities giving rise to its Michigan destination receipts took place entirely within Michigan, the tax would have been **$74,858.50**, instead of **$25,084.69**, for the year 1954; **$58,832.32**, instead of **$17,364.21**, for the period January 1, 1955 to July 1, 1955; **$78,627.41**, instead of **$30,538.54**, for the period July 1, 1955 through December 31, 1955; and **$212,318.23**, instead of **$72,986.65**, for the years 1954 and 1955.

The differences between these tax amounts are due solely to application of the apportionment formula. While for the years 1954 and 1955, 9.2032 and 8.4774 per cent, respectively, of appellant's total adjusted receipts or income were derived from Michigan destination sales, the formula attributed only 3.1065 and 2.8620 per cent, respectively, to Michigan for tax purposes.

It is manifestly absurd for the appellant to contend that the tax in question, as applied to the appellant, has the operative effect, and should be subject to the jurisdictional limitations of, a direct, unapportioned tax on gross receipts.

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[9]

At a rate of 4 mills, the tax for the last half of the calendar year 1955 would amount to $18,792.95, and applied to the Michigan destination receipts of $24,193,049.00 would result in a ratio of .000777. This is the manner in which the ratios were computed for the entire period.

The tax in question is as far removed from a direct tax on interstate commerce as is the traditional net income tax. Since an opposite conclusion constitutes the cornerstone of appellant's "substantial question" argument, it has failed in its effort to present a substantial question.

QUESTION PRESENTED

No proper or substantial federal question is presented.

The sole issue is:

"Is the State of Michigan prohibited by the federal constitution from imposing (by Act 150 of the Michigan Public Acts of 1953, as amended) a tax upon the "income" or "adjusted receipts" of appellant, a foreign corporation conducting local activities through employees operating at and from Michigan offices, when the appellant's "adjusted receipts" or "income" are apportioned to Michigan by a three-factor formula comprised of property, payroll and receipts?"[10]

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[10] Appellant, in its Jurisdictional Statement (JS 4) so greatly distorts the issue as to leave the reader to believe that the tax in question is imposed on or measured by (1) gross receipts (2) derived from non-Michigan sources and activities. The fact is, however, that the tax is imposed on or measured by (1) only such adjusted receipts or income (2) derived from Michigan sources. Further, appellant there indicates that its activities in Michigan are limited to mere solicitation. The fact is, however, that appellant's activities in Michigan include everything necessary and incidental to establishing and maintaining generally its position in the steel industry and to utilizing Michigan as an established and continuing market for its products. Appellant's activities in Michigan resulted in its utilization of Michigan as a direct source of $91,000,000 of gross receipts for the period 1954 and 1955. Appellant is here con-

It is respectfully submitted that inasmuch as the tax in question is not a forbidden direct tax on interstate commerce and does not tax, in whole or in part, appellant's activities and transactions outside the State of Michigan, its application in the instant case is clearly constitutional.

By their Motion to Dismiss or Affirm, appellees raise the following issues:

1. The questions presented by the appellant do not present substantial federal questions and are too unsubstantial to warrant further argument.

2. The appellant has not properly raised any federal question.

3. The judgment of the Supreme Court of Michigan is conclusive.

STATEMENT OF THE CASE

Appellees cannot accept the appellant's statement of the case (JS 5-10). Appellant would lead this Court to believe that the only activity it carries on in Michigan is mere solicitation of "interstate sales" and activities incidental to such solicitation. It is respectfully submitted that the uncontroverted facts contained in the affidavit of Thomas M. Splan and Robert F. Van Haaren (App 63a-90a), submitted in support of appellees' motion for summary judgment (App 60a-62a) and reproduced in part by the Supreme

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tending that it can carry on these activities in Michigan and derive these receipts from Michigan sources without paying any tax to the state as recompense for the protection and many benefits and privileges accorded it by the State of Michigan in connection therewith.

Court of Michigan in its opinion (App 18a-23a), clearly indicate that the appellant did carry on in Michigan in a regular and systematic manner, substantial, varied and continuous activities that do not fit appellant's label "solicitation."

These activities involve any personnel deemed necessary by appellant's management to establish and maintain appellant's position in the steel industry and to utilize Michigan as a continuing market for a substantial part of its total product, and such other activities as are deemed helpful in the over-all conduct of its business, both in Michigan and elsewhere, including activities pertaining to its wholly owned subsidiary, Armco Drainage and Metal Products, Inc.[11] This activity can in no wise be considered "solicitation" or "incidental to solicitation" in the traditional sense of these terms.

To carry out its Michigan business and activity, appellant's top executive personnel regularly make contacts there. Through the activities of these executives, there is centered in Michigan very substantial top echelon determinations which require the use of appellant's Michigan facilities and personnel. These top-level determinations are related to the company problems of negotiation of long-range steel allotments and commitments; determination of potential steel requirements of important customers; advance commitments of such customers for the continued use of appellant's products both within and without Michigan (many of the appellant's customers who have their principal offices there, such as General Motors, do business

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[11] Appellant carries on activity in Michigan by its subsidiary, which it completely controls and dominates. This subsidiary has plants located in Michigan and purchases from the appellant all the steel it fabricates.

throughout the United States and the world, where they have use for appellant's products); disposition of quality problems warranting top-level consideration because of their magnitude; future planning and projection (including determination of future sales policy, capacity and limitation of appellant's mills, etc.); and maintaining appellant's position in the steel market and in the industry, both within and without the state of Michigan (App 73a-74a).

These problems are closely related and directly concerned with the nature of the qualifications and duties of the various personnel who carry on activities in Michigan. These include the sales manager of the Detroit district office; the officer manager of the Detroit district office; salesmen and various clerical help, working under the direct supervision of the office manager; mill representatives, representing particular mills of the appellant in Michigan in regard to production, quality, and research problems; product managers, constituting specialized product representatives; operating division personnel, concerned with transporting, loading and unloading, and the packaging and wrapping of appellant's products; treasury division personnel, concerned with credits and financial arrangements; research division personnel, concerned with the development of new steel products and who follow the experimental use in Michigan and elsewhere of such products as well as new applications of existing products of appellant; and market development personnel, concerned with long-range planning and the gathering and utilization of economic data, etc.

The nature of the duties and activities of these persons in Michigan for the period in question dispells appellant's contention that it engages in no local activity constituting a proper subject of local taxation. None of this personnel directly solicits orders for appellant's products.

The district sales manager is "primarily to direct and coordinate the activities of his sales personnel in an effort to carry out effectively and efficiently Management's requests pertaining to the securing of profitable business in his territory." (App 82a) These requests, in many instances, relate to the over-all business of the appellant and involve the activities on a day-by-day functional basis of market development, research, operating, traffic, and treasury division personnel, as well as many executives. All such activities are centered, directed, coordinated, and supervised from appellant's Michigan office in Detroit, under the direct authority and responsibility of the Detroit district sales manager.

Thus, the district sales manager and those personnel working in Michigan or coming into Michigan at his request or at the request of top management implement and carry out established business practices and policies of the appellant within Michigan, to the end that appellant will be able to produce products in conformity with the detailed requirements of its Michigan customers; that appellant's Michigan customers may be kept informed of appellant's products and their availability; and that customers will place substantial orders with appellant for their steel needs on a routine and continuing basis because they have been convinced that appellant is a good and dependable continuing source for these products.

The salesmen are not "solicitors" or "drummers" in any concept of these terms. They are assigned specific territories in which existing customers are located, to serve each customer as appellant's representative. Their duties include funneling and handling all information between the appellant and the customer and finalizing with the customer any agreement, order, complaint or adjustment whatsoever. These activities, multiple in nature, disclose

the discharge of a wide range of authority and responsibility and take place before, during, and after the delivery of appellant's products in Michigan.

They gather information for, and use information and the services of, personnel from various divisions of appellant, other than the sales division, all such activities being related to the over-all business and operations of the appellant both within and without Michigan.

It is believed unnecessary for the purpose of this motion to consider in any further detail the nature of the activities of appellant's personnel in Michigan.[12]

General facts concerning appellant's activities in Michigan in part are:

1. That the activity of all of appellant's personnel in Michigan is directly related to appellant's ability to to have, establish and maintain in Michigan a market for its products. (App 74a)

2. That the activity of appellant in Michigan is not directly related to the solicitation of any particular orders for any of appellant's products. (App 72a-74a)

3. That all of the customers' orders for the appellant's products for delivery in Michigan routinely flow through the Detroit district office, with the exception of those orders from customers located in the counties served by the Chicago district office on an established

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[12]

The detailed facts pertaining to their activity in Michigan and the operations of the Detroit district office are set forth in affidavit form at pages 63a-90a of the Appendix before the Supreme Court of Michigan.

and continuing basis; and orders are not picked up by appellant's salesmen except in those instances where the salesmen may be at the customer's place of business at the particular time that an order is ready for mailing. (App 74a-75a)

4. That the appellant's personnel in Michigan process through the Detroit district office all complaints of customers located in the area serviced by such office and transmit to the customers in Michigan authorization for the adjustment and settlement of complaints. (App 75a)

5. That appellant's salesmen do not routinely solicit specific orders but spend their time in making general, routine contacts with the customers to handle specific problems or complaints and to get commitments for orders on a continuing basis and in handling complaints and problems in connection with processing orders in their offices in the district offices of appellant. (App 75a)

6. That much of the activity of the appellant in Michigan is incurred because appellant routinely furnishes steel to make a particular part and is held responsible if its product fails to make the particular part for which it was furnished. (App 75a)

7. That most of the orders received by the appellant are of a recurring nature and constitute routine reorders of steel to make a particular part in accordance with prior arrangements between appellant and its customers. (App 75a)

8. Some of the activity in Michigan takes place before the interstate movement of appellant's products, and some afterwards. (JS 23a)

On the basis of such facts, the Courts below concluded

> "* * * that in necessary result the business activities tax here reaches income-producing transactions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution." (App 117a, JS 36a)

Appellant asserts that this conclusion is in direct conflict with the decisions of this Court and that, thus, a substantial federal question is presented by its appeal.

It is respectfully submitted that the facts involved in this case amply support the lower Courts' decisions, irrespective of the labels appellant would attach to either the taxing statute here involved or its activities in Michigan.

1

A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED[13]

Appellant has not presented a substantial federal question to this Court of alleged unconstitutionality of Act No. 150 of the Michigan Public Acts of 1953, as amended by Act No. 282 of the Michigan Public Acts of 1955, because:

A. The appellant has not sustained the burden of estab-

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[13] In the alternative, the federal question is too unsubstantial to warrant further argument.

lishing, either in the Courts below or in its Jurisdictional Statement, that the tax in question, as imposed on it, violates any affirmative principle of constitutional law; and

B. The appellant bases its substantial federal question argument on the following erroneous principles:

1. Appellant errs in contending that the tax in question cannot constitutionally be distinguished from a gross receipts tax.

The tax is imposed upon adjusted receipts or income attributable to Michigan by application of the Massachusetts-type apportionment formula (JS 13).[14] It is clear that the tax in question does not have the jurisdictional scope of an unapportioned gross receipts tax.

2. Appellant errs in asserting that there is no known activity that will support the tax, as in

Western Live Stock v. *Bureau*, 303 US 250, 82 L ed 823, 58 S Ct 546, **and**

B. F. Goodrich Co. v. *Washington* (1951), 38 Wash (2d) 663, 231 P (2d) 325, certiorari denied 342 US 876, 96 L ed 659, 72 S Ct 167.

In fact, the local activity of appellant in Michigan is as extensive and as comprehensive as the local activity in such cases as

B. F. Goodrich Co. v. *Washington* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167

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[14] This is demonstrated by computation of appellant's tax in "Statutes Involved," *supra*, p 8.

U. S. Steel v. *Washington* (1957), 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of substantial federal question 358 US 46, 3 L ed (2d) 44, 79 S Ct 40

Berkshire Fine Spinning Assoc. v. *City of New York* (1959), 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86

Field, Enterprises, Inc. v. *Washington* (1956), 47 Wash (2d) 852, 289 P (2d) 1010; aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55[15]

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[15]

Nor are the activities in the instant case distinguishable in their relationship to interstate commerce from the taxable activities sustained in *International Shoe Co.* v. *Washington*, 326 US 310, 90 L ed 95, 66 S Ct 154; *East Ohio Gas Co.* v. *Tax Com.*, 283 US 465, 75 L ed 1171, 51 S Ct 499; *Coverdale* v. *Pipe Line Co.*, 303 US 604, 82 L ed 1043, 58 S Ct 736 (This case makes an exhaustive analysis of the question of separability of local activities related to commerce for purposes of state taxation); *Canton Railroad Co.* v. *Rogan*, 340 US 511, 95 L ed 488, 71 S Ct 447; *American Mfg. Co.* v. *St. Louis*, 250 US 459, 63 L ed 1084, 39 S Ct 522; *Pacific Telephone Co.* v. *Tax Commission*, 297 US 403, 80 L ed 760, 56 S Ct 522; *Utah Power & Light Co.* v. *Pfost*, 286 US 165, 76 L ed 1038, 52 S Ct 548; *Central Greyhound Lines* v. *Mealey*, 334 US 653, 92 L ed 1633, 68 S Ct 1260; *Norton Company* v. *Dept. of Revenue* (1951), 340 US 534, 95 L ed 517, 71 S Ct 377; *Railway Express Agency, Inc.* v. *Virginia* (1959), 358 US 434, 3 L ed (2d) 450, 79 S Ct 411; *Northwestern States Portland Cement Co.* v. *Minnesota* (1959), 358 US 450, 3 L ed (2d) 421, 79 S Ct 357; *West Publishing Co.* v. *McColgan*, 27 Cal (2d) 705, 166 P (2d) 861, aff'd 328 US 823, 90 L ed 1603, 66 S Ct 1378; *Memphis Gas Co.* v. *Stone*, 335 US 80, 92 L ed 1832, 68 S Ct 1475; *Interstate Pipe Line Co.* v. *Stone*, 337 US 662, 93 L ed 1613, 69 S Ct 1264; *ET & WNC Transportation Co.* v. *Currie*, 248 NC 560, 104 SE (2d) 403, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602; *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La 651, 101 So (2d) 70, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602.

3. Appellant errs in stating that a tax on gross receipts from interstate commerce is forbidden by the commerce clause (JS 14).

This position of appellant is contrary to the long line of decisions of this Court, from

> *McGoldrick* v. *Berwind-White Co.* (1940), 309 US 33, 84 L ed 565, 60 S Ct 388,

to date upholding the right of the state where the buyer is located and the goods delivered, to impose a gross income or receipts tax, if the receipts are a result of local activity within the taxing jurisdiction by the taxpayer, as in the instant case.[16]

This is illustrated by the factual references contained in "Statement of the Case," *supra*, pp 12-18; Hartman, Paul J., "State Taxation of Interstate Commerce," Dennis & Co., Inc., Publishers, Buffalo, N.Y., 1953, p 101, analyzes such cases as holding: "* * * Privileges closely connected with interstate commerce have been thus regarded as distinct from the commerce for purposes of taxation. * * *"

[16]

These cases include *Felt & Tarrant Co.* v. *Gallagher* (1939), 306 US 62, 83 L ed 488, 59 S Ct 376; *Graybar Electric Co.* v. *Curry* (1939), 308 US 513, 84 L ed 437, 60 S Ct 139, affirming per curiam 238 Ala 116, 189 So 186; *McGoldrick* v. *Berwind-White Co.* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388; *McGoldrick* v. *Felt & Tarrant Co.* (1940), 309 US 70, 84 L ed 584, 60 S Ct 404; *Jagels* v. *Taylor* (1940), 309 US 619, 84 L ed 983, 60 S Ct 465, affirming per curiam 280 NY 766, 21 NE (2d) 526; *Dept. of Treasury* v. *Wood Corp.* (1941), 313 US 62, 85 L ed 1188, 61 S Ct 885; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 US 359, 85 L ed 888, 61 S Ct 586; *Allied Mills, Inc.* v. *Dept. of Treasury of Indiana, et al.* (1943), 318 US 740, 87 L ed 1119, 63 S Ct 558, affirming per curiam 220 Ind 340, 42 NE (2d) 34; *General Trading Co.* v. *Tax Commission* (1944), 322 US 335, 88 L ed 1309, 64 S Ct 1028; *International Harvester Co.* v.

These cases, in turn, are not at variance with the decisions of this Court forbidding the seller-state to subject to tax gross income or receipts from sales transactions consummated by delivery to buyers in other states as a result of local activity carried on there,

J. D. Adams Mfg. Co. v. *Storen*, 304 US 307, 82 L ed 1365, 58 S Ct 913

Freeman v. *Hewit*, 329 US 249, 91 L ed 265, 67 S Ct 274

or those cases denying the buyer-state the right to collect a tax from the seller where he does not have, within the jurisdiction, a tangible or substantive presence of a more or less permanent nature,

McLeod v. *Dilworth Co.*, 322 US 327, 88 L ed 1304, 64 S Ct 1023

Miller Brothers Co. v. *Maryland*, 347 US 340, 98 L ed 744, 74 S Ct 535

4. Appellant errs in concluding that this Court has never sanctioned the division of receipts from a sale between two states and that, therefore, irrespective of

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Dept. of Treasury (1944), 322 US 340, 88 L ed 1313, 64 S Ct 1019; *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; *B. F. Goodrich Co.* v. *Washington* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; *Field Enterprises, Inc.* v. *Washington* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *U. S. Steel* v. *Washington* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question, 358 US 46, 3 L ed (2d) 44, 79 S Ct 40; *Berkshire Fine Spinning Assoc.* v. *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86.

apportionment, the tax is invalid, either as a tax on interstate activities or the receipts therefrom (JS 15).

This conclusion overlooks (1) the basic purpose of apportionment in the first instance, e.g., to protect interstate transactions from multiple or discriminatory burdens and (2) this Court's references to apportionment in cases such as

J. D. Adams Mfg. Co. v. *Storen, supra*, 304 US 307, 82 L ed 1365, 58 S Ct 913

Central Greyhound Lines v. *Mealy, supra*, 334 US 653, 92 L ed 1633, 68 S Ct 1260

Ott v. *Mississippi Barge Line*, 336 US 169, 93 L ed 585, 69 S Ct 432

Railway Express Agency v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411

Northwestern States Portland Cement Co. v. *Minnesota, supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357

Western Livestock v. *Bureau, supra*, 303 US 250, 82 L ed 823, 58 S Ct 546

As stated in *Western Livestock* v. *Bureau, supra*, 303 US 250, at pp 256, 275:

> "• • • Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state • • •.
>
> "• • • it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross

receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. * * *"

5. Appellant errs in arguing that the character of the tax as a net income tax renders the tax invalid under the due process clause because the statute does not permit the deduction of payrolls or depreciation to arrive at the tax base. (JS 17)

Appellant argues that the tax is imposed in effect on non-Michigan payrolls and property. Application of the apportionment formula to the tax base produces no such result.

As set forth above at p 10, appellant's tax in the instant case would have been $212,318.23, instead of $72,986.65, if its property and payroll giving rise to its Michigan destination receipts were Michigan properties and payrolls.[17] Furthermore, a steel company located entirely within Michigan, which produced and delivered the same amount of steel in this state as appellant for the period in question, would have been subject to a tax of $212,318.23. This alone proves the reasonableness of the formula as applied to appellant. Thus, appellant's due process argument is without substance.

In its due process clause argument, as in its commerce clause argument, appellant fails to give recognition to the fact that the tax here is imposed upon only those activities and adjusted receipts reasonably attributable to Michigan.

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[17] This is on the assumption that the relationship of Michigan destination receipts to property and payroll of appellant is the same as the relationship of appellant's total receipts to its total properties and payrolls everywhere.

by use of an apportionment formula (using the factors of physical property, payroll and sales), that has traditionally been sustained as a fair method of apportioning business income of a manufacturing concern such as appellant.[18]

Against the contention that the Massachusetts-type formula attributed net income to California, when in fact no income was earned from California sources, this Court said:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed * * *.
>
> "* * * We cannot say that property, payroll, and

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[18]

This formula, commonly known as the Massachusetts formula, has been approved by the American Bar Association, the National Tax Association, and the National Association of Tax Administrators, as stated in their joint committee report entitled "The Coördination of Federal, State and Local Taxation," at p 42:

> "It is recommended by the Joint Committee that the well-known Massachusetts formula shall generally be followed in allocating the business income of corporations and other organizations among the states in which the business is conducted. This formula is particularly applicable to manufacturing and mercantile businesses, which account for a substantial part of interstate commerce. * * *"

Such formula has been approved on various other occasions by the National Tax Association:

"Report of Committee on Standardization and Simplification of Business Taxes," 1929 Proc. Nat. Tax Ass'n 152;

"Report of Committee on Uniformity and Reciprocity in State Taxing Legislation," 1933 id. 259;

"Preliminary Report of Committee of N.T.A. on Allocation of Income," 1938 id. 486;

"Report of Committee of N.T.A. on Allocation of Income," 1939 id. 190.

sales are inappropriate ingredients of an apportionment formula. * * *"

Butler Bros. v. *McColgan*, 315 US 501, pp 507, 509 [86 L ed 991, 62 S Ct 701][19]

As stated in Jerome R. Hellerstein, "State and Local Taxation," Prentice-Hall Law School Series, p 276 (1952):

"* * * It is widely believed that these three factors [the Massachusetts formula factors of tangible personal property, payrolls and sales] ordinarily will reflect fairly the claims of the states to their respective portions of a manufacturing or vending corporation's income or receipts." (Footnote references omitted; bracketed material added)

The due process contention of appellant was thus properly disposed of by the Supreme Court of Michigan, when it stated:

"* * * a reasonable apportionment formula, provided in the statute here under consideration, ends questions of due process. * * * the tax is levied on activities

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[19]

To like effect are: *International Harvester Co.* v. *Evatt*, 329 US 416, 91 L ed 390, 67 S Ct 444; *Railway Express Agency, Inc.* v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411; *Northwestern States Portland Cement Co.* v. *Minnesota*, (1959), *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357; *Ford Motor Co.* v. *Beauchamp*, 308 US 331, 84 L ed 304, 60 S Ct 273.

As stated in *International Harvester*, *supra*, 329 US 416, at p 423:

"* * * Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. * * *"

carried on within this State. The statute carefully provides that it shall be levied only on 'adjusted receipts,' 'derived from or attributable to Michigan sources.' This makes for fair and reasonable apportionment of the tax to Michigan business, Michigan activities only. To requote from *Western Live Stock v. Bureau of Revenue of New Mexico*, 303 US 250, 256 (56 S Ct 546, 82 L ed 823, 115 ALR 944):

"'Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing State.'

"When plaintiff seeks to attack the formula of apportionment as unreasonable or unfair, the distinct burden rests upon it of 'showing by "clear and cogent evidence" that it results in extraterritorial values being taxed.' Butler Brothers v. McColgan, 315 US 501, 507 (62 S Ct 701, 86 L ed 991). Such are not the facts before us, * * *." (JS 31a-32a)

As has been demonstrated above in this motion, the tax in question is one imposed upon adjusted receipts or income from Michigan activities or sources.[20] For purposes of determining its validity against due process and

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[20]

In fact, the appellant does not engage in interstate commerce in Michigan. The only interstate commerce is the transmission of goods and commodities across state lines. This is done by interstate carriers and not by the appellant. In order that this interstate commerce may take place, the appellant carries on within Michigan a continuous, systematic, and regular activity which is not related to interstate commerce but localized to the utilization of Michigan as a substantial market for its products and for other varied and miscellaneous purposes.

commerce clause objections, it makes little difference whether the tax be characterized as a direct tax on gross receipts, such as that involved in *McGoldrick* v. *Berwind-White Co.* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388, and *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; or a tax imposed on local activities measured by such receipts, as in *Interstate Pipe Line Co.* v. *Stone*, *supra*, 337 US 662, 93 L ed 1613, 69 S Ct 1264; *Memphis Gas Co.* v. *Stone*, *supra*, 335 US 80, 92 L ed 1832, 68 S Ct 1475; *Canton Railroad Co.* v. *Rogan*, *supra*, 340 US 511, 95 L ed 488, 71 S Ct 447; *Western Live Stock* v. *Bureau*, *supra*, 303 US 250, 82 L ed 823, 58 S Ct 546; *International Shoe Co.* v. *Wash.*, *supra*, 326 US 310, 90 L ed 95, 66 S Ct 154; and the more recent cases of *Field Enterprises, Inc.*, v. *Washington* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *B. F. Goodrich Co.* v. *Wash.* (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; *U. S. Steel* v. *Wash.* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question 358 US 46, 3 L ed (2d) 44, 79 S Ct 40; and *Berkshire Fine Spinning Assoc.* v *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86.

Furthermore, as above indicated, the case in question has not been jurisdictionally distinguished by the appellant from the incidence and operative effect of a net income tax, upheld by this Court in

> *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357

and its companion case of

Brown-Forman Distillers Corp. v. *Collector of Revenue*, *supra*, 234 La 651, 101 So (2d) 70, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602, and

ET & WNC Transportation Co. v. *Currie*, *supra*, 248 NC 560, 104 SE (2d) 403, aff'd per curiam Mar. 2, 1959, 359 US 28, 3 L ed (2d) 625, 79 S Ct 602[21]

The Michigan Supreme Court determined that the tax in question, as applied to the appellant, met every test laid down by this Court in *Northwestern Portland Cement Company* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357. After quoting at length from the ma-

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[21]

To the same effect are:

Bass, Ratcliff & Gretton, Ltd. v. *State Tax Com.*, 266 US 271, 69 L ed 282, 45 S Ct 82

U. S. Glue Co. v. *Oak Creek*, 247 US 321, 62 L ed 1135, 38 S Ct 499

Memphis Gas Co. v. *Beeler*, 315 US 649, 86 L ed 1090, 62 S Ct 857

West Publishing Co. v. *McColgan*, *supra*, 27 Cal (2d) 705, 166 P (2d) 861, aff'd 328 US 823, 90 L ed 1608, 66 S Ct 1378

Interstate Busses Corp. v. *Blodgett*, 276 US 245, 72 L ed 551, 48 S Ct 230

Hump Hairpin Co. v. *Emmerson*, 258 US 290, 66 L ed 622, 42 S Ct 305

Western Cartridge Co. v. *Emmerson*, 281 US 511, 74 L ed 1004, 50 S Ct 383

National Leather Co. v. *Massachusetts*, 277 US 413, 72 L ed 935, 48 S Ct 534

International Shoe Co. v. *Shartel*, 279 US 429, 73 L ed 781, 49 S Ct 380

Butler Bros. v. *McColgan*, *supra*, 315 US 501, 86 L ed 991, 62 S Ct 701

Atlantic Coast Line RR v. *Daughton*, 262 US 413, 67 L ed 1051, 43 S Ct 620

jority opinion (JS 33a-35a), the Supreme Court of Michigan specifically concluded (JS 35a-36a):

> . . . . Application of the above quoted language from *Northwestern Cement Company* to the facts here, leaves the validity of the Michigan tax undoubted. For here, as in that case, (1) there is no direct restriction on interstate commerce, (2) the tax is not imposed on persons coming into the State for a temporary purpose, such as itinerant drummers, (3) the tax is not laid on the privilege or right on engaging in interstate commerce in the State, (4) the tax does not discriminate against interstate commerce by providing a direct commercial advantage to local business, nor does it subject it to an undue burden, but, on the contrary, it is laid alike on activities in furtherance of either inter- or intrastate business, computed according to the adjusted receipts therefrom derived from or attributable to Michigan sources, (5) the tax is not a regulation of any kind, (6) the State is left to collect only through ordinary means and, hence, the tax does not compel plaintiff to pay for the privilege of engaging in interstate commerce, (7) as in *Northwestern Cement Company*, the possibility of a multiple burden from this exaction is not made to appear here, (8) this is not an ~~unapportioned~~ tax which by its very nature makes interstate commerce bear more than its fair share and, (9) what the State is exacting is a constitutionally fair demand for that aspect of interstate commerce to which this State bears a special relation. Accordingly, the tax must be held to be constitutional and valid as applied to plaintiff and its activities here. In the language of the trial judge:
>
> " 'It is our view that in necessary result the business activities tax here reaches income-producing trans-

actions in the State of Michigan; that there is a sufficient activity here in the State to establish jurisdictional presence for tax purposes, and that the formula used since it attempts to reach only that portion which is attributable to Michigan activity, contravenes neither the due process nor commerce clauses of the Federal Constitution.' "

Appellant has substantiated its argument of a substantial federal question only by erroneously labeling its activity in this state "solicitation" (analogous to the type of activity in the "drummer" cases, such as *Nippert* v. *Richmond*, 327 US 416, 90 L ed 760, 66 S Ct 586) and by unsupportedly asserting that a tax on or measured by receipts from interstate commerce is invalid *per se*. The activities of appellant in Michigan (see Statement of Case, *supra*, pp 12-18, and JS 5-12) eliminate its solicitation argument.

Cases such as *McGoldrick* v. *Berwind-White* (1940), *supra*, 309 US 33, 84 L ed 565, 60 S Ct 388; *Norton Co.* v. *Dept. of Revenue* (1951), *supra*, 340 US 534, 95 L ed 517, 71 S Ct 377; *Field Enterprises, Inc.* v. *Wash.* (1956), *supra*, 47 Wash (2d) 852, 289 P (2d) 1010, aff'd 352 US 806, 1 L ed (2d) 39, 77 S Ct 55; *B. F. Goodrich Co.* v. *Wash.*, (1951), *supra*, 38 Wash (2d) 663, 231 P (2d) 325, cert. denied 342 US 876, 96 L ed 659, 72 S Ct 167; and *Berkshire Fine Spinning Assoc.* v. *City of New York* (1959), *supra*, 184 NYS (2d) 623, appeal dismissed for want of substantial federal question 361 US 3, 4 L ed (2d) 51, 80 S Ct 86, establish that a state can constitutionally impose a tax on receipts from interstate sales transactions, or can measure a local activities tax by such receipts.

In the *Norton* case, *supra*, this court upheld the imposition of the retailers' occupation tax of Illinois on gross

receipts derived from sales from f.o.b.—outstate origins, to Illinois customer destinations, if the sales resulted from local sales activities.

Field Enterprises, Inc., supra, and *B. F. Goodrich Co., supra*, concerned the validity of the State of Washington's business activities tax which was measured by gross receipts derived from sales of products delivered into Washington as a result of local solicitation and sales office activities carried on there.[22]

Berkshire Fine Spinning Assoc., supra, pertained to the imposition of the city of New York's business activities tax measured by apportioned gross receipts.

The material facts in the *Field Enterprises*, *B. F. Goodrich*, and *Berkshire* cases are not distinguishable for constitutional purposes from the facts in the case at bar, for, admittedly, all of appellant's sales activity in connection with its Michigan destination sales is centered in Michigan, it is essential in order for appellant to sell its products there. Furthermore, the subjects of taxation in these cases are analogous to the tax imposed by Act No. 150 of the Michigan Public Acts of 1953, as amended, in the case at bar. This Court found that either there was no substantial federal question presented in these cases or the federal question was so unsubstantial as to not require further argument. *Field Enterprises* was affirmed per curiam; *Berkshire* was dismissed per curiam; and certiorari was denied in *B. F. Goodrich*.

It is therefore apparent that appellant poses no sub-

[22]

To the same effect is *U. S. Steel* v. *Washington* (1957), *supra*, 51 Wash (2d) 224, 316 P (2d) 1099, appeal dismissed for want of a substantial federal question, 358 US 46, 3 L ed (2d) 44, 79 S Ct 40.

stantial federal question by this appeal, even on the erroneous supposition that the tax in question is one measured by or on gross receipts from interstate sales.[23]

2.

APPELLANT'S CASE DOES NOT PRESENT A FEDERAL QUESTION[24]

The foregoing analysis of the applicable statutory and case law establishes that a proper federal question can be predicated only upon:

1. A showing by the appellant that the tax in question is imposed on the privilege of engaging in interstate commerce. Appellant attempts to make no such showing and the Supreme Court of Michigan expressly found to the contrary.

2. A showing by the appellant that the tax as applied

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[23]

In fact, even supposing that appellant's activities in Michigan are as contended by it and that the tax is a gross receipts tax, all the gross receipts cases from *Berwind-White* to date (see footnote 15, p 20) support the constitutionality of the tax.

[24]

As we view *Railway Express Agency, Inc.* v. *Virginia* (1959), *supra*, 358 US 434, 3 L ed (2d) 450, 79 S Ct 411, and *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, 358 US 450, 3 L ed (2d) 421, 79 S Ct 357, it is evident that state statutes will not be declared unconstitutional by this Court for commerce clause or due process reasons unless it is affirmatively established that the tax is imposed on the privilege of engaging in interstate commerce or unless it is shown by clear and cogent evidence that extraterritorial events, receipts, activities or privileges are being taxed.

to it "is so palpably unreasonable that it violates due process." Since there is not a scintilla of evidence to establish that the tax in question unreasonably measures appellant's Michigan benefits, privileges and activities, appellant's due process argument must fail.

Irrespective of how the tax is characterized — whether as a tax on local activities, a condition precedent to doing a local business, an income tax, or a gross receipts tax — the appellant still has pointed to no fact and has cited no authority that would entitle it to any relief.

3.

THE DECISION OF THE STATE COURT IS CONCLUSIVE

This Court has held on numerous occasions that it would not disturb findings or conclusions of fact if supported by competent evidence, nor change the construction or operative effect given to states' taxing statutes if supported by the statutory language. The Supreme Court of Michigan specifically found that the operative effect of Act No. 150, Michigan Public Acts of 1953, as amended, as applied to appellant, is to subject to taxation in Michigan only adjusted receipts or income reasonably attributable to that state as a result of appellant's utilizing Michigan as a market for a substantial part of its total product and as a source of contact and information for the present and future over-all conduct of appellant's business.

The Supreme Court of Michigan specifically found that the taxing statute in question is a general statute imposed upon all persons engaged in business activities; that it is not a tax on the privilege of engaging in interstate com-

merce; and that it does not subject interstate commerce to discriminatory or multiple burdens.

It is respectfully submitted that such conclusions and findings of the Michigan Supreme Court have ample support in the record and clearly establish the lack of substance to appellant's argument.

RELIEF

It is respectfully submitted, for the reasons herein stated, that this Honorable Court should dismiss the appeal or affirm the judgment of the lower court.

Respectfully submitted,

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